

Claimant argues the authorized treating physician had taken claimant off work and respondent refused to pay temporary total disability compensation until the day before a scheduled preliminary hearing. The parties then entered an agreed Order specifying the weeks that temporary total disability compensation was due and payable. A timely demand for payment was made a week after the Order was filed and payment was not received

until after 20 days. Accordingly, claimant further argues penalties are appropriate and respondent's delay in payment justifies the amount of penalties awarded. Claimant requests the Board to affirm the ALJ's Order.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

The facts are not seriously disputed. On July 27, 2005, the authorized treating physician, Dr. Estivo, took the claimant off work due to surgery. Then on August 8, 2005, claimant's attorney sent a seven-day demand letter to the respondent requesting temporary total disability compensation and filed an application for preliminary hearing. A preliminary hearing was scheduled for September 29, 2005. Respondent's counsel contacted the claimant's attorney the day before the scheduled hearing and agreed to the payment of temporary total disability compensation.

Claimant's attorney received the agreed Order on September 29, 2005, signed it and then returned it the same day to the respondent. The Order provided temporary total disability benefits would be paid for the period of July 27, 2005 through August 16, 2005. This agreed Order was later filed with the ALJ's office and signed on October 7, 2005. On October 14, 2005, claimant's attorney mailed a 20-day demand for payment of the temporary total disability compensation which was received by the insurance carrier's counsel on October 18, 2005. The insurance carrier, Liberty Mutual, received the same 20-day demand on October 20, 2005. Claimant finally received the \$1,142.86 payment on November 14, 2005.

Claimant's attorney argued that penalties were appropriate because payment was received five days late and respondent's conduct warranted assessment of penalties. At the motion hearing, claimant's counsel argued in part:

Normally I would not pursue something five days overdue, but in this instance, the authorized doctor took this man off work, the insurance carrier knew it, they wouldn't voluntarily pay the TTD, we had to go through the entire demand process, set the matter on your docket, the day before they agreed to enter an order, we then send the order out as required, and they continue to wait and procrastinate and so a man who was off work July the 27th by the authorized treating physician, the insurance company full well knew he was off work, did not receive his temporary total disability benefits until over four months later.<sup>1</sup>

Respondent and its insurance carrier's counsel countered:

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<sup>1</sup> M.H. Trans. at 6-7.

Your Honor, the chronology that was given by Mr. Carmichael is for the most part correct. We were five days late in the receipt [sic] of that TTD check. That means that it was mailed out probably on the 20th day or 19th day, but not yet received in his office until the 14th. I certainly don't think that that's a penalty type situation that we need to be here on, Your Honor. It just does not seem logical to penalize the insurance carrier when the check was probably placed in the mail in a timely fashion pursuant to their 20-day demand letter, and we at most are five days late. It does not seem that a hundred dollars a week would be appropriate in this case.<sup>2</sup>

In its brief to the Board the respondent also argues that at some time a check had been sent to claimant, but because it was sent to the wrong address, payment was stopped and the check was then sent to claimant's counsel. Claimant's counsel correctly notes that neither that argument nor supporting evidence was provided to the ALJ at the penalties hearing.

The 20-day demand was received by the insurance carrier's counsel on October 18, 2005, and the insurance carrier on October 20, 2005. The parties do not dispute that the 20-day period for payment ended on November 9, 2005.

K.S.A. 44-512a(a) provides:

In the event any compensation, including medical compensation, which has been awarded under the workers compensation act, is not paid when due to the person, firm or corporation entitled thereto, the employee shall be entitled to a civil penalty, to be set by the administrative law judge and assessed against the employer or insurance carrier liable for such compensation in an amount of not more than \$100 per week for each week any disability compensation is past due and in an amount for each past due medical bill equal to the larger of either the sum of \$25 or the sum equal to 10% of the amount which is past due on the medical bill, if: (1) Service of written demand for payment, setting forth with particularity the items of disability and medical compensation claimed to be unpaid and past due, has been made personally or by registered mail on the employer or insurance carrier liable for such compensation and its attorney of record; and (2) **payment of such demand is thereafter refused or is not made within 20 days from the date of service of such demand.** (Emphasis added)

K.S.A. 44-512a allows civil penalties when compensation, which is unpaid and past due, is not paid in a timely fashion. The statute requires that a written demand for payment setting forth with particularity the items of disability and medical compensation claimed to be unpaid and past due must be either personally or by registered mail delivered to the employer or the insurance carrier and its attorney of record. Respondent then has 20 days from the date of service of such demand to make payment or be assessed penalties. The

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<sup>2</sup> *Id.* at 7-8.

statute allows for penalties of up to \$100 per week for each week any disability compensation is past due.

Respondent argues that because the check was mailed on the 20th day the statute was complied with and penalties are not appropriate. The Board disagrees.

Even assuming respondent's check was issued within the 20 days, K.S.A. 44-512a requires that payment must be made within 20 days from the date of service of the demand. There is nothing in the Workers Compensation Act which allows the mailing of the check to constitute the making of payment. The Board concludes rather that it is the receipt of the money which constitutes payment in this instance. As it is undisputed the check was not received until November 14, 2005, the Board finds respondent has failed to make payment of the temporary total disability compensation within 20 days of the demand.

The claimant was taken off work by the authorized treating physician and the claimant was still required to schedule a preliminary hearing to address his request for temporary total disability compensation. Then a day before the scheduled hearing respondent agreed to pay temporary total disability compensation but there was additional delay in filing the agreed Order and then after receipt of the 20-day demand the payment was not made until 5 days after the 20-day period had run. The Board, therefore, finds that the penalties assessed by the ALJ's January 19, 2006 Order are appropriate and affirmed.

**WHEREFORE**, it is the finding of the Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated January 19, 2006, is affirmed.

**IT IS SO ORDERED.**

Dated this 31st day of March 2006.

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BOARD MEMBER

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BOARD MEMBER

c:     John L. Carmichael, Attorney for Claimant  
       Michael E. Streit, Attorney for Respondent and its Insurance Carrier  
       Nelsonna Potts Barnes, Administrative Law Judge  
       Paula S. Greathouse, Workers Compensation Director